Ganesan a/l Muthusamy v Public Bank Bhd

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HIGH COURT (PULAU PINANG) — APPEAL NO 29R-53 OF 2010
VARUGHESE GEORGE JC
6 MAY 2011

B

Bankruptcy — Notice — Substituted service — Validity of order for substituted service ('order for SS') challenged — Debtor claimed affidavit supporting application for order for SS failed to contain, inter alia, averment he was avoiding or evading service — Whether averment mandatory — Whether sufficient to state facts as would enable court to conclude debtor was avoiding service — Bankruptcy Rules 1969 rr 97 & 110 — Practice Note No 1 of 1968

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The judgment debtor ('JD'), in bankruptcy proceedings taken against him, appealed to the judge against the senior assistant registrar's decision dismissing his application to invalidate (i) the court order extending the validity of the bankruptcy notice ('BN') (ii) the order for substituted service ('order for SS ') of the BN and (iii) the service on him of the BN and the creditor's petition ('CP'). At the appeal hearing, however, the JD only challenged the validity of the order for SS of the BN. He said the order did not comply, inter alia, with Practice Note No 1 of 1968. The JD argued that the affidavit in support of the application for the order for SS should have an express averment that the person to be served was avoiding or evading service and in order to make that averment it was necessary to identify the person who had provided any information when the attempt at service was made. The JD said no such averment or evidence was contained in the affidavit filed by the judgment creditor ('JC') in the present case. The JC said rr 97 and r 110 of the Bankruptcy Rules 1969 ('Rules') governed an application for an order for SS of the BN or CP and it was for the court to conclude whether a debtor was evading service based on the evidence in the JC's affidavit. In the present case all attempts at service, including the one after a letter of appointment had been issued, were made at the JD's last known address. The order for SS was also posted or affixed at that address. The JD had conceded that that was his address.

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Held, dismissing the appeal with no order as to costs:

(1) There was no requirement that some 'magic' words to the effect that the debtor was evading or avoiding service should be included in the affidavit in support of an application for an order for SS. The applicant need only candidly state the facts that could assist the court to come to the conclusion the debtor was keeping out of the way of service, for an order for SS to be issued (see para 12).

I

(2) The JD did not raise any issue as to the fact of the posting of the letter of appointment by the JC's solicitor and/or receipt by him of the same. Most materially, the JD conceded it was his address where all three attempts at service as well as the posting/affixing of the order for SS were made or done (see paras 13(d) & (e)).

(3) Nowhere in the guidelines in Practice Note No 1 of 1968 was it mandatory that an averment that the 'subject' was avoiding or evading service had to be included in the affidavit in support of the application for an order for SS (see para 8(ii)).

(4) The opening words of r 110 of the Rules denoted that it was for the court to conclude the debtor was keeping out of the way to avoid service and the obligation was on the applicant to adduce evidence or facts based on which the court could come to that conclusion. It should be noted that under that rule the court had the discretion to issue an order for SS 'for any other cause' as well (see para 11).

(5) There was no doubt the JD had sufficient notice of the BN and/or CP issued against him at all material times (see para 14).

[Bahasa Malaysia summary

Penghutang penghakiman ('JD'), dalam prosiding kebankrapan yang diambil terhadapnya, merayu kepada hakim terhadap keputusan timbalan kanan pendaftar yang menolak permohonannya untuk mentaksahkan (i) perintah mahkamah yang melanjutkan kesahan notis kebankrapan ('NK') (ii) perintah untuk penyampaian ganti ('perintah PG') NK dan (iii) penyampaian NK ke atas dia dan petisyen pemiutang ('PP'). Walau bagaimanapun, pada pendengaran rayuan, JD hanya mencabar kesahan perintah PG NK. Dia menyatakan perintah tersebut tidak mematuhi, antara lain, dengan Nota Amalan No 1 1968. JD berhujah bahawa afidavit sokongan permohonan untuk perintah PG tersebut patut mempunyai penegasan nyata bahawa orang yang akan diserahkan menghindari atau mengelak penyampaian dan untuk membuat penegasan tersebut adalah perlu untuk mengenal pasti orang yang memberikan apa-apa maklumat apabila percubaan penyampaian dibuat. JD menyatakan tiada penegasan atau keterangan sedemikian terdapat di dalam afidavit yang difailkan oleh pemiutang penghakiman ('JC') dalam kes ini. JC menyatakan kk 97 dan 110 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah') mengawal permohonan untuk perintah PG NK atau PP dan mahkamah hendaklah memutuskan sama ada penghutang mengelak penyampaian berdasarkan keterangan dalam afidavit JC. Dalam kes ini kesemua percubaan untuk penyampaian, termasuk satu selepas surat pelantikan dikeluarkan, dibuat kepada alamat terakhir JD yang diketahui. Perintah PG juga dilekatkan pada alamat tersebut. JD telah mengaku bahawa itu adalah alamatnya.

Diputuskan, menolak rayuan tanpa perintah terhadap kos:

(1) Tidak terdapat keperluan bahawa beberapa perkataan 'magic' yang perlu

bahawa penghutang menghindari atau mengelak penyampaian patut dimasukkan dalam afidavit sokongan terhadap permohonan untuk perintah PG. Pemohon hanya perlu secara terus terang menyatakan fakta yang boleh membantu mahkamah untuk mencapai kepada keputusan yang penghutang mengelak penyampaian, untuk perintah PG dikeluarkan (lihat perengan 12).

(2) JD tidak membangkitkan apa-apa isu terhadap fakta mengenai peguam JC mengeposkan surat pelantikan dan/atau dia menerima surat tersebut. Apa yang material, JD mengaku ia adalah alamat dia di mana ketiga-tiga percubaan penyampaian selain melekatkan perintah PG dibuat (lihat perengan 13(d) & (e)).

(3) Sama sekali tidak terdapat dalam garis panduan dalam Nota Amalan No 1 1968 bahawa adalah mandatori penegasan yang 'subject' menghindari atau mengelak penyampaian mesti dimasukkan di dalam afidavit sokongan permohonan untuk perintah PG (lihat perengan 8 (ii)).

(4) Perkataan-perkataan pembukaan k 110 Kaedah-Kaedah menandakan bahawa mahkamah hendaklah memutuskan yang penghutang mengelak penyampaian dan kewajipan adalah ke atas pemohon untuk mengemukakan keterangan atau fakta berdasarkan yang mana mahkamah boleh mencapai kepada keputusan tersebut. Ia patut diambil kira bahawa di bawah kaedah tersebut mahkamah juga mempunyai budi bicara untuk mengeluarkan perintah PG 'for any other cause' (lihat perengan 11).

(5) Tidak terdapat kesangsian yang JD mendapat notis yang memadai mengenai NK dan/atau PP yang dikeluarkan terhadapnya pada semua masa material (lihat perengan 14).]

Notes

For cases on substituted service, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3051–3059.

Cases referred to

Aris bin Massod; ex p UOL Factoring Sdn Bhd [1999] 3 MLJ 358; [1998] 4 CLJ Supp 446, HC (not folld)

Yeap Chee Fun ex p Pemas Trading Sdn Bhd, Re [2000] 5 MLJ 510; [2000] 5 CLJ 280, HC (refd)

Legislation referred to

Bankruptcy Rules 1969 rr 97, 110

(V Muthusamy & Associates) for the judgment debtor.
(Toh Theam Hock & Co) for the judgment creditor.

Varughese George JC:

[1] This appeal by the appellant/judgment debtor ('JD') was against the decision of the learned senior assistant registrar of the 28 September 2010 which dismissed the JD's applications made *vide* encl 27 in Penang High Court, Bankruptcy No 29–340 of 2007. The learned senior assistant registrar had thereupon proceeded to enter adjudication and receiving orders against the JD.

[2] In encl 27, the JD had sought for orders to invalidate:

(i) the order of Court of 28.05.2007 to extend the validity of the Bankruptcy Notice (BN);

(ii) the order of Court of 28.05.2007 for substituted service of the BN on JD; and

(iii) the service of the BN and also the Creditors Petition (CP) on the JD.

[3] However at the hearing of the *appeal* before me, counsel for the JD confined the appeal to *just one issue*, namely *whether the order for substituted service of the BN had been properly issued by the court* and consequently whether the BN had indeed been served on the JD.

It was obvious that the effect being sought to be drawn by the JD was that if the service of the BN was ruled to be invalid, no 'act of bankruptcy' that would have occurred to ground the CP taken out against the JD.

JD'S ARGUMENT

[4] The main thrust of the JD's contention was that the court in making the order for substituted service of the BN (28 May 2007) had not complied with the strict requirements of Practice Notes 1 of 1968 and in support of that position referred to the observation of Steve Shim J (as he then was) in the High Court decision in *Re Aris bin Massod; ex p UOL Factoring Sdn Bhd* [1999] 3 MLJ 358; [1998] 4 CLJ Supp 446.

Counsel for the JD, based on that observation in *Re Aris bin Massod*, argued that in applying for an order for substituted service, the affidavit in support of such an application must have an express averment that the 'subject' was avoiding or evading service. It was also necessary to also indentify the person who had provided any information when the attempt at service was made which in turn was relied on to state the belief that the subject was avoiding or evading service. Counsel further stated that in this case there was no such statement or evidence in the affidavit filed by or for the JC with the application for the order for substituted service.

THE RESPONDENT/JUDGMENT CREDITORS' (JC) ARGUMENT

[5] It was submitted for the JC that the *Re Aris bin Massod* had since been overruled by the Court of Appeal and in any event the decision of the High Court there could be distinguished on the facts and was not relevant to the instant case.

It was argued that r 97 read together with r 110 of the Bankruptcy Rules 1969 were the specific provisions related to an application for substituted service of the BN. The conclusion whether the individual against whom the BN was issued was 'keeping out of the way to avoid service' was for the court to make on the facts to be presented by way of affidavit by the JC.

In the present case evidence had been laid before the court of two unsuccessful attempts at service and also of the further attempt (third attempt) after a letter of appointment had been issued. All these attempts had been made at an address, not disputed at all, to be the address of the JD. The order for substituted service was also subsequently 'posted' or affixed at this same premises.

COURTS EVALUATION OF SUBMISSIONS:

[6] Counsel for JC did at the hearing of this appeal tender a copy of the 'Perintah' of the Court of Appeal dated 30 August 2000 in Civil Appeal No W03–44 of 1998 (*UOL Factoring Sdn Bhd v Aris bin Massod*) which confirmed that the appeal of UOL Factoring Sdn Bhd against the decision of Steve Shim J had been allowed by the Court of Appeal. Although no grounds for the decision of the Court of Appeal seem to have been issued, the order of the Court of Appeal produced was clear that the decision of the High Court had been set aside ('Perintah Hakim bertarikh 29hb Mei 1998 di Mahkamah Tinggi diketepikan').

[7] Counsel for JD nevertheless contented that the setting aside of the orders of the High Court by the Court of Appeal did not necessarily mean that the principles, which according to him, had been laid down by Steve Shim J at the High Court, had been overruled.

[8] I have examined the decision of Steve Shim J in *Re Aris bin Massod* — the only authority relied by the JD in this appeal. I make the following observations in respect of that High Court decision (even though it has since been set aside):

(a) the attention of His Lordship does not appear to have been drawn to r 97 and r 110 of the Bankruptcy Rules 1969, which in my view were the specific operative provision for consideration when an application for an order for substituted service of a BN or CP was before the courts. The

general guidelines found in Practice Note 1 of 1968 as held in *Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd* [2000] 5 MLJ 510; [2000] 5 CLJ 280 is '… not the law, it is merely a direction for administrative purposes …';

(b) *in any case*, the guidelines found in Practice Note 1 of 1968 nowhere makes it mandatory that there must be an averment that the 'subject' was avoiding or evading service to be included in the affidavit in support of such an order to be made. Items No 6 and 7 of the said Practice Note only stipulate that the affidavit in support for the order for substituted service to be made should state —whether on the attempt made by appointment (the second attempt), the process server had made an enquiry whether the 'subject' had received the letters of appointment, and if it was claimed that the 'subject' is away, whether the letter of appointment had been forwarded to him; and

(c) the observation of Steve Shim J was also in the particular context of the facts obtaining in that case, as was obvious from the following excerpts from that decision:

> Furthermore. the first call made by Ong on 16 November 1997 is not entirely clear. According to him, the call was unsuccessful because he was informed that the JD was not in. *There is no indication as to who had informed him or how the information was actually conveyed or communicated to him. I think it important to state the name of the person from whom he obtained the information as well as the person' relationship to the JD in order to establish reliability. In the absence of these particulars. I would have doubts* about whether there was any call *on 16 November 1997* as alleged or if there was one, whether it was made effectively or in a satisfactory manner.
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> In summary therefore, having regard to ail the circumstances, I do not think that the JC had complied with the guideline set out in the Practice Note No 1 of 1968. Such contravention and/or non-compliance would have a debilitating effect upon the stand taken by the JC which in turn militates against granting its application. For the reasons given, I hold that the application for the BN to be served on the JD by way of substituted service should have been refused and therefore the order granted there under is invalid and should be set aside.

Obviously His Lordship had doubts about the first attempt at service in that case.

[9] I therefore hold that the reliance by JD solely on the decision of Steve Shim J as support for the JD's argument here was wholly misplaced and unsustainable. In any event, it was beyond any dispute that the Court of Appeal had set aside that High Court decision notwithstanding that the benefit of knowing the specific reasons for the appeal being allowed was not available.

[10] The issue of whether the order for substituted service of the BN made on 28 May 2007 had been properly issued should be determined by reference to r 97 and r 110 of the Bankruptcy Rules 1969 as argued for the JC. The said provisions are reproduced here:

> Rule 97 Service of notice
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> A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.
>
> Rule 110 Substituted service
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> (1) *If the court is satisfied by affidavit* or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or *for any other cause it may order substituted service* to be effected in such manner as it thinks fit.
>
> (2) Where any such order has been carried out the petition shall be deemed to have been duly served on the Debtor.

[11] The opening words of r 110, 'If the Court is satisfied' clearly to me, denotes that it is for the court to be satisfied, meaning to come to the conclusion, that the debtor (subject) was keeping out of the way to avoid service. The obligation on the person applying for such an order for substituted service to be granted, was to adduce evidence or facts based on which the court could come to that conclusion.

It should also be noted that the court is further vested with the discretion to issue such an order for substituted service 'for any other cause' as well under r 110.

[12] There is accordingly no requirement, in my assessment, that some 'magic' words to the effect that the debtor (subject) was evading or avoiding service should be included in the affidavit in support of such application, as was urged upon this court by counsel for JD. The applicant need only candidly state the facts that could assist the court to come to the conclusion the debtor is keeping out of the way of service, for an order for substituted service to be issued.

[13] The following factual development that emerged in the context of this case, need to be highlighted as well:

(a) two attempts at service of the BN were made, namely on 17 April 2007 at 11am and on 18 April 2007 at 10 at the last known address of the JD, namely at *No 27 Jalan Intan Bagan Aiam 13000 Butterworth*;

(b) on 30 April 2007, a letter was issued by solicitors for JC setting an appointment for the 5 May 2007 at about 10am to effect another attempt

at service of the BN on the JD. The JD was requested to contact the said solicitors to fix an alternative appointment if the stated time and date was not suitable to the JD.

This letter which fixed the said appointment was sent to the same address by post and the 'Certificate of Posting' in respect thereto was exhibited in the affidavit of the process server, En Abdul Halim bin Ab Razak affirmed on 8 May 2007;

(c) on 5 May 2007, the third attempt (ie pursuant to appointment) at service was also unsuccessful. The process server who attempted service was told that JD was not at the place;

(d) the JD did not raise any issue as to the fact of the posting of the letter of appointment by JC's solicitor and/or receipt by the JD of the same; and

(e) *most materially*, it was conceded by the JD (as was also manifest from the JD's address shown in the affidavits affirmed by him) that *No 27 Jalan Intan Bangan Aiam 13000 Butterworth* was the address of the JD. All the three attempts at service as well as the posting/affixing of the order of substituted service were made or done at this address.

[14] It was also brought to the attention of this court that the debt that formed the subject matter of the bankruptcy proceeding against the JD still remained unsettled. The JD had unsuccessfully attempted to set aside the judgment obtained against him, (on which the bankruptcy proceeding was based) even up to the Court of Appeal. The JD had also now abandoned his earlier position that the CP had not been received or served on him. Viewed against this backdrop the one issue that the JD confined to in this appeal was, in my view, at best a mere 'technical' objection to avoid the consequences of bankruptcy.

There was no doubt in my mind that the JD had sufficient notice of the BN and/or CP, issued against him at all material times.

[15] I was not persuaded therefore that the order of court of 28 August 2007 permitting the JC to effect service of the BN by way of substituted service on the JD was in the first place improperly made or invalid.

That order was clearly sustainable in the light of the r 97 read with r 110 of the Bankruptcy Rules 1969.

[16] The learned senior assistant registrar was not in error on any account therefore, in my finding, to dismiss encl 27 in Bankruptcy No 29–340 of 2007 and to order the adjudication and receiving orders that she proceeded to make against the JD.

The appeal was therefore dismissed. There was no order as to costs. The JD (appellant) had already been adjudged a bankrupt.

Appeal dismissed with no order as to costs.

Reported by Ashok Kumar